1981

Minnie H. Thomas v. Clearfield City, A Municiple Corporation : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE

STATE OF UTAH

MINNIE H. THOMAS, Plaintiff and Appellant,	)	CASE NO. 17338
v.	)	
CLEARFIELD CITY, A Municipal Corporation, Defendant and Respondent.	)	

BRIEF OF APPELLANT

Appellant's Brief
From the Judgment of the Second Judicial
District Court of Utah Davis, State of Utah
THE HONORABLE J. DUFFY PALMER
DISTRICT COURT JUDGE

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MINNIE H. THOMAS,	)	
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Plaintiff and Appellant,	)	CASE NO. 17338
	)	
v.	)	
	)	
CLEARFIELD CITY, A Municipal Corporation,	)	
	)	
Defendant and Respondent.	)	
	)	

BRIEF OF APPELLANT

STATEMENT OF THE KIND OF CASE

Appellant filed a Complaint for damages against the Respondent upon the basis of negligence in maintaining a sewer and water disposal system.

DISPOSITION IN LOWER COURT

The Lower Court granted Summary Judgment to the Respondent barring Appellant's claim under the Utah Governmental Immunity Act.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the Summary Judgment granted by the Lower Court, and a finding that the Appel-

lant's cause of action is not barred by the Utah Governmental Immunity Act.

STATEMENT OF FACTS

The Appellant is a long-time resident of Clearfield City, State of Utah, and has resided in her home located at 176 South 400 East for many years.

That in May, 1978, the plaintiff suffered flooding in the basement of her premises, and alleged the flooding to be a direct and proximate result of the negligent conduct of the Respondent. (R 1)

That after notice was duly given to Clearfield City, and such claim not having been acted on by Respondent, the plaintiff commenced action by filing her Complaint on or about March 13, 1979.

That the Respondent asserted as a defense that it was immune from suit in accordance with U.C.A. § 63-30-1, et seq. (R 6)

That in discovery the Appellant requested that the Respondent state the factual basis of denial of Paragraph 5 of Appellant's Complaint, which stated in essence that the defendant was negligent in not properly maintaining the sewer system along 200 South, within the confines of Clearfield City, to which the Respondent responds as follows:

> The sewer system along 200 South was installed properly. The blockage that occurred was as a result of tree roots

> growing in the sewer line and as soon as the city was notified of this blockage, it was removed. (R 17)

That the Appellant in response to the Interrogatories of the Respondent, did state relative to the factual basis upon which said Appellant was claiming negligence by the Respondent as follows:

> That plaintiff on information and belief, believes that the defendant has regularly failed to inspect and check the various drains and sewer lines in and about the City of Clearfield. (R 26)

That the Appellant also stated in its Answer to Respondent's Interrogatories that there had been a small amount of water around the drain in the basement of her home in March, 1978, and Roto Rooter Company in Ogden, had been summoned to her residence and found nothing in the Appellant's sewer lines to cause flooding. (R 25)

That the Respondent thereafter sought summary judgment against the Appellant, asserting U.C.A. § 63-30-10(4) which provides that governmental immunity is not waived for a negligent act or omission of an employee committing within the scope of his employment if the injury "arises out of the failure to make an inspection, or by reason of making an inadequate or negligent inspection of any property".

That the Lower Court in ruling upon Respondent's Motion, held as follows:

> It's the opinion of the Court that it is in fact a function that can only be reasonably handled because of the health and wealth and benefit of the people, and in this case, especially knowing the plaintiff, I would rather rule differently, but I think I would be dishonest if I did not. The Motion, the defendant's Motion for Summary Judgment is granted.
>
> I think the dissenting opinion is much more clearly the law and I think will become the law, even in this, probably. (TR 5)

ARGUMENT

POINT I.

THE DOCTRINE OF GOVERNMENTAL IMMUNITY SHOULD NOT APPLY IN THE INSTANT CASE.

The Utah Supreme Court in Standiford v. Salt Lake City Corporation, 605 P.2d 1230 (1980), rejected the governmental versus proprietary function for determining whether or not governmental immunity attached, and specifically held as follows:

> We therefore hold that the test for determining governmental immunity is whether the activity under consideration is of such a unique nature that it can only be performed by a governmental agency, or that it is essential to the core of governmental activity. Clearly, this new standard broadens governmental liability. However, the position is consistent with the plain legislative intent in § 63-30-1, et seq., to expand governmental liability.

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>
> . . .
>
> Finally, and not the least of our concerns, the standard we adopt today to narrow governmental immunity should allow more innocent victims injured by tortuous conduct on the part of public entities access to the Courts for redress. Fewer such people will be mercilessly and senselessly barred from recovery from their injuries sustained at the hands of the entities designed to serve them.

Thus, the present test for determining governmental immunity is whether the activity involved is such of unique nature that it can only be formed by a governmental agency or that such activity is essential to the core of governmental activity and specifically, the present determination of sewer and water disposal systems.

That the Utah Supreme Court in Nestman v. South Davis County Water Improvement District, 398 P.2d 203 (Utah, 1965), in considering an action by home owners to recover damages from flooding caused when the Water Improvement District's reservoir gave way, held as follows:

> Where a public body, which would otherwise be entitled to soverign immunity, engaged in an activity of a commercial proprietary character, the protection does not exist. Specifically, we have held that when the City carries on the business of operating a water system in supplying water for fees, it is a

> proprietary function, and the City is liable for damages or injury caused by its negligence in connection therewith; . . .

It is submitted the Court's consideration of fees in finding a "proprietary function" in the supplying of water by either a city or political subdivision should be extended to apply to the providing of water and sewage disposal for fees as presented in the instant case. That while the Court was considering the governmental versus "proprietary function" concept, the broadening of governmental liability under the test set forth in Standiford v. Salt Lake City Corporation, supra, provides a reasonable and logical basis for finding the the Respondent is not immune from suit by the Appellant herein.

It is further submitted that permitting the Respondent or any other governmental subdivision to sit idly back and not inspect or to inspect inadequently or negligently any property which could result in the Appellant and other innocent citizen in being senselessly barred from recovery is such a result that is inconsistent with the Supreme Court's broadening of governmental liability in the Standiford case, supra.

The Michigan Supreme Court in Parker v. City of Highland Park, 273 N.W.2d 413 (Mich., 1978), which was extensively cited with approval by the Utah Supreme Court in the Standiford v. Salt Lake City Corporation, supra, held as follows:

> Because an activity is not proprietary, it does not necessarily follow that the activity is governmental. We would limit the term 'governmental functions' to those activities sui generis governmental - of essence to governing.

CONCLUSION

It is therefore submitted to this Honorable Court that the Respondent should not be permitted to hide behind the cloak of governmental immunity where the activity of furnishing water and sewer disposal to its residents is not of such a unique nature that it can only be performed by a governmental agency, and that maintaining of such a system is not essential to the core of governmental activity, and that this Court should remand the case to the Lower Court for trial on the issue of negligence.

RESPECTFULLY SUBMITTED this 4 day of February, 1981.

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 4th day of February, 1981, I mailed a true and correct copy of the above and foregoing Appellant's Brief, by placing same in the United States Mail, postage prepaid and addressed to the following:

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